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In The

Supreme Court of the United States

October Term, 1963

No. 668

JOHN A. BROSS, ET AL.,

Petitioners,

v.

BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of The United States and The Associate Justices of The Supreme Court of The United States:

Respondents desire to briefly set forth some of the reasons why the petition for writ of certiorari to review the judgment of the Supreme Court of Appeals of Virginia entered on June 11, 1963, should not be granted.

JURISDICTION

Petitioners have made no attempt to comply with Rule 23 Paragraph 1(b)(iii) in that they have failed to set forth the statutory provision believed to confer jurisdiction on this Court.

Respondents point out that this Court lacks jurisdiction by virtue of the fact that the petitioners are praying for a writ of certiorari to "review the judgment of the Supreme Court of Appeals of Virginia entered on June 11, 1963" (see Petition for a writ of Certiorari, pg. 1) but first made application for the writ on December 9, 1963, more than "ninety days after the entry of such judgment or decree." (U.S.C. Title 28 § 2101 [c]). No application for an extension of time for applying for a writ of certiorari was requested and none was granted. The application was made beyond the time for which an extension could have been granted. (U.S.C. Title 28 § 2101 [c]).

Petitioners apparently rely upon the order of the Supreme Court of Appeals dated September 11, 1963, as the final order from which their time commenced to run, however, it is the order of June 11, 1963, which they seek to have reviewed and the Code of Virginia, 1950, as amended; § 8-470, provides that where a petition for writ of error is rejected on the ground that the order complained of is plainly right, as was the petition for writ of error in this case (see Petition for Writ of Certiorari, Appendix, page 21-A) "no other petition therein shall afterwards be entertained." The Supreme Court of Appeals of Virginia has ruled that the rejection of a petition for writ of error is final (See *Morgan v. Commonwealth*, 115 Va. 943, 79 S.E. 388).

The United States Code sections, the Virginia Code section and the opinion of the Supreme Court of Appeals in the case referred to are set forth in the Appendix hereto.

Failure of petitioners to apply for certiorari within the time prescribed by law divest this Court of jurisdiction. *Toledo Scale Co. v. Computing Scale Co.*, 43 S. Ct. 458, 261 U. S. 399, 67 L. Ed. 719; *Rust Land etc. Co. v. Jackson, Miss.*, 39 S. Ct. 424, 250 U. S. 71, 63 L. Ed. 850.

We do not question the jurisdiction of this Court to decide cases arising under the 14th Amendment, but in addition to failure of petitioners to make timely application no substantial 14th Amendment question is presented by the petition.

STATEMENT OF FACTS

This case was originally tried in the Circuit Court of Fairfax County where the Court heard testimony for almost four days. None of the evidence presented by the respondents there is set forth by the petitioners. They have followed the same pattern in their application for writ of certiorari to this Court that they followed in their petition for writ of error to the Supreme Court of Appeals of Virginia, to-wit, setting forth the evidence in the light most favorable to them and completely ignoring the principle that the trier of the facts having decided the issues against them has resolved the conflicts in the evidence against them.

The record in this case is replete with evidence that the zoning of the Merrywood tract for high-rise apartments was in the best interests of the people of Fairfax County. The testimony of one witness alone, Frederick H. Bair, Jr., a man conceded to be an expert on planning, zoning and economic development, would have been sufficient to justify the Board of Supervisors of Fairfax County in taking the action complained of by the petitioners. Petitioners fail to mention the fact that Mr. Bair testified that the area of which Merrywood is the center is framed by natural barriers with unusual clarity, that the area is set apart from the rest of the county in a way which makes it an "island" for development, that it has strong functional ties with the federal employment complex, that population and economic factors are mounting rapidly and change is inevitable, that the development of the area for residential use as apart-

ments will diminish the traffic loads by moving people nearer their work, that existing and proposed highways and bridges make a concentration of residential population in the Merrywood area logical and desirable, that there are no present plans, federal or state, for use of the area as a park; that single-family use appears impractical and would require excessive clearing, cutting and filling and would destroy the park-like appearance which could be largely retained by high-rise apartments with low land coverage. It was Mr. Bair's conclusion that "logic and equity" suggest that the planning area be zoned for multiple-family development.

The petitioners set forth the fact that the Board of Supervisors have adopted criteria to guide them in the zoning of land for apartments. They fail to point out that there was evidence before the Board of Supervisors and the Court that the Merrywood tract met every one of those criteria.

Contrary to a positive statement in the petition, Mrs. Wilkins did not testify that Supervisor Leigh offered to "swap votes" with her. The only reference to such a statement is taken from a newspaper clipping which it was stipulated could be offered without formal proof but subject to objection for materiality and relevance. The clipping was never offered so that such objections could be raised and ruled upon by the Court. All of the "evidence" regarding Mr. Leigh's bank loan came from this same newspaper clipping which was never formally offered into evidence.

In short, this matter was heard by the Board of Supervisors for at least 6 or 7 hours at which time the proponents of the rezoning presented extensive evidence as to the desirability of rezoning the tract. After hearing that evidence, the Board agreed with its Planning Staff and rezoned the land. The matter was heard in the Circuit Court of Fairfax County for four days at which time that Court heard the evidence and concluded that the Board had ample ground for

its decision and that there was no merit to the contention that petitioners had not had a full and fair hearing on the matter. The Supreme Court of Appeals of Virginia determined that that decision was "plainly right." The evidence in the record fully justifies each of these decisions.

STATEMENT

AS TO WHY THERE IS NO SUFFICIENT REASON FOR THE GRANTING OF A WRIT OF CERTIORARI

I

The Interest of the Federal Government In the Case

None of the petitioners nor their counsel have authority to represent the interest of the Federal Government in pending litigation. That authority is expressly conferred upon the Attorney General of the United States by United States Code, Title 5, Section 310, (Appendix, pg. 2) Under the provisions of that code section, the Attorney General may send the Solicitor General or any officer of the Department of Justice into any court of the United States or of any State to attend to the interests of the United States in any pending litigation. No such action was taken by the Attorney General in this case and it can only be assumed that he properly concluded that there were no federal interests involved in the purely local function of rezoning land in Fairfax County which was privately owned.

Apparently the Federal Authorities have concluded that the actions taken by the County and State officials and Courts are proper for, as petitioners note, the Department of Interior has sought to condemn a scenic easement over the Merrywood tract. If such condemnation is valid, the issues involved in this case are moot.

II

The General Public Interest

Petitioners argue that "even assuming that the rezoning action of Fairfax County when tested only by considerations within its own boundaries would be reasonable exercise of the police power, the general public welfare * * * renders the rezoning an unreasonable use of that power."

In this case, a landowner has been "permitted" to make such use of his property as he desires. No police power had to be resorted to at all. Repeal all the zoning laws, let the police power lie idle and the respondents could go forward. The reasonableness of the use of police power is involved when one is being restricted in some manner—in that event the general public welfare may be sufficient that the "rights" of an individual may be curtailed. In this case no person complains that his rights are limited by the police power and the question of public welfare is not involved. If it were, respondents are aware of no provision of the Constitution divesting the States of power to make the final "public welfare" determination.

III

The Fourteenth Amendment Question

On page 34 of the petition, the petitioners set forth the basis of their claim that this case arises under the Fourteenth Amendment to the Constitution of the United States:

> "Moreover, it is also clear that Respondents have been granted an extremely valuable benefit which has been denied to Petitioners."

There is no evidence in the record to show that there is a single parcel of land in the "Island" identical to "Merrywood." The "Merrywood" tract contains 40.4 acres and can be developed for high-rise apartments in a manner that will preserve the park-like character of the area. The largest other tract in the area shown by the record, is an 11 acre tract owned by Bross. Other tracts are 2.78 acres owned by Southall, 4 1/2 acres owned by Miscamphell and 1 acre owned by Lejune. The size of the tract was a very important consideration in the rezoning. The report of the Planning Staff makes it clear that "Merrywood" is in a different category from the adjacent properties.

> "Thus, we have one of the few remaining sites along the river where advantage of the Potomac water front for residential development may be taken. There is no other land left along the river, either in Arlington, Alexandria or the District of Columbia, available for high-rise, high-rental multi-family development in a setting such as this tract would offer."

In addition to the fact that the "Merrywood" tract is unique, there is no evidence—and indeed the record would rebut the thought—that any other landowner has sought similar action by the Board. Until application is filed and denied, it is too early to cry that equal protection has been denied.

It is a fundamental concept of constitutional law, firmly established, that only a person whose rights have been affected may assail the constitutionality of legislation. The cases supporting that principle are legion.

CONCLUSION

It is respectfully submitted that the application for certiorari comes far too late and that no sufficient reason is shown why this Court should review the actions of the Courts of Virginia as to the rezoning of land in Virginia privately owned.

Respectfully submitted,

FREDERICK T. GRAY
LYTTON H. GIBSON
Counsel for Respondent
Hugh D. Auchinclos

RALPH G. LOUK
Commonwealth Attorney
for Fairfax County, Va.

January 8, 1964

APPENDIX

United States Code—Title 28 Section 2101

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judg-

ment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

United States Code—Title 5 Section 316

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

Code of Virginia, 1950, As amended, Section 8-476

§ *8-476. Action on petition; finality thereof.*—The court or judge to whom the petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal or writ of error, and in either case may award a supersedeas to stay proceedings in whole or in part. Upon presentation of such petition, either to the court or any judge, counsel for the petitioner shall be afforded, if he so desires, reasonable opportunity to state orally his reason or reasons why such appeal or writ of error should be granted. The petition shall be rejected when it is from an

interlocutory decree or order, if the court or judge to whom it is presented deems it proper that the case should be proceeded in further in the court below before an appeal is allowed therein. If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term.

Morgan v. Commonwealth
115 Va. 943

BY THE COURT.

Morgan was indicted before the circuit court of Wise County for malicious shooting and was sentenced to four years' confinement in the penitentiary. He filed his petition asking for a writ of error from this court, and praying that a new trial be awarded him. This petition was considered by this court at its session in Wytheville on the 16th day of June, 1913, and the court being of opinion that the said judgment was plainly right, refused the said petition and affirmed the judgment. See abstract of judgment of this court filed with the record.

By section 3466 of the Code it is provided, among other things, that when the court of appeals "shall deem the judgment, decree or order complained of plainly right, and shall reject the petition on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term."

The case before us comes clearly within the operation of the statute. The court, as appears from its order, deemed the judgment complained of plainly right and rejected the petition on that ground, and the order of rejection so states; therefore, this court has no jurisdiction to entertain any other petition with respect to it, and the amended petition presented at this term of court is, for these reasons, rejected.

Refused.